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IN THE

Supreme Court of the United States

October Term, 1963

No. 905

STEVE E. ANTHONY,

Petitioner,

vs.

COUNTY OF LOS ANGELES,

Respondent.

Petition for Writ of Certiorari With Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States:

Petitioner prays that a Writ or Writs of Certiorari issue to review the decision of The District Court of Appeal, Second Appellate District, State of California, affirming judgment rendered in favor of the plaintiff, the respondent herein, in said action entitled: The Superior Court of the County of Los Angeles, County of Los Angeles, plaintiff versus Steve E. Anthony, defendant.

Statement as to Basis of the Case.

Respondent County of Los Angeles passed a resolution condemning amongst others the subject property to wit the petitioner's home pursuant to statute Section 25351.3-4 California Government Code (Appendix A herein) for public use as a television and motion picture

museum. Thereafter, respondent commenced proceedings in the Superior Court of the State of California for the County of Los Angeles to take title to said premises pursuant to said resolution upon a complaint alleging said public use. Petitioner the defendant in said proceedings, by his answer and offer of proof upon the trial raised the following issues:

1. Is a motion picture and television museum a public use? Does it meet the test of public necessity?

2. That the taking was not in fact for public use.

The trial Court ruled as a matter of law that since the condemner was the County of Los Angeles the use was a public use and would therefore not permit proof that in fact the manner of use by the County was intended or planned or contracted in such manner so as to in fact cause a private use in the present and/or in the future. Judgment was rendered in favor of the plaintiff. Defendant appealed relying upon these issues. Said appeal was denied on February 26, 1964. (Copy of the opinion on said appeal is appended hereto and marked Appendix B.)

The Appellate Court took the position that the issues before it were:

1. "... is a motion picture and television museum a public use? ..."

2. "... whether the leasing of this property to private individuals to run the museum, hopefully at a profit, constitutes a taking for private rather than public use? ..." (... although the Court neither allowed nor had any evidence of private use.)

On the first issue the Court held that California follows the broader definition of "public use." And on the second issue,

> ". . . the fact that it is later to be returned to private ownership subject to restrictions protecting the public use does not make it any the less a public use . . . once it is determined that the taking is for a public purpose, the fact that private persons may receive benefits is not sufficient to take away from the enterprise the characteristics of a public purpose. . . ."

What constitutes sufficient restriction or the lack thereof so as to take away the character as a public purpose is a question of fact depending upon the evidence, the specific facts and circumstances. The Court failed to note or comment that no evidence was taken on basis established on the points of restrictions, balancing and testing the public and private benefits. These were the pivotal factual issues overlooked by the trial and appellate Courts. The Court held,

> ". . . under the California view of 'public use' this offer of proof was properly excluded."

and accordingly denied petitioner's application for a writ of supersedeas.

Pursuant to Rule 38 of the Rules of this Court petitioner's counsel sought a stipulation as to the record on appeal. In defiant contempt of this Court and its Rules, the County and its counsel use public power to go above the law—as it has in all its dealings herein. County Counsel refused even to discuss or to make any effort to stipulate as to the said record.

Previous Application.

On or about February 21, 1964, petitioner made application to The Supreme Court of the State of California for an order staying enforcement of the judgment for respondent herein, upon a writ of supersedeas. On February 26, 1964 The Supreme Court of the State of California denied, without opinion petitioner's said application for a writ of supersedeas.

No other application for the relief sought herein has been made or is pending in any Court.

On February 29, 1964, by telegraphic notice of motion petitioner moved this Court for a stay pending determination of this Writ of Certiorari. Thereafter, on the same day respondent's counsel orally stipulated to the stay, this petition to be filed by March 10, 1964. Petitioner thereafter on March 1, 1964, asked that said application for a stay be held in abeyance. Respondent has since taken no action to enforce this judgment.

Jurisdiction of the Supreme Court to Review.

(1) Petitioner contends that the taking herein was an unlawful exercise of the power of eminent domain in violation of the pertinent sections of the Constitution of the United States.

(2) The State Court ruling sought to be set aside is contrary to the decisions of the Supreme Court of the United States violating Amendments I, V and XIV of the Constitution (Appendix C herein).

(3) Issues have been raised herein upon which the Supreme Court of the United States has made no ruling. Said issues involve Federal rights of the petitioner and the public interest in general. The issues, the rights

of private property, the power of the State in eminent domain, are of far reaching public concern.

(4) State views have developed which are inconsistent with each other upon the law in reference to (a) the interpretation of public use in the various States and (b) the tests applied by the various States as to what facts and circumstances render the use in fact a private one although designated as public.

Opinion Below.

The Opinion (Appendix B) of the District Court of Appeal for the Second Appellate District, State of California, filed on or about January 14, 1964, is in substance as follows:

(1) The general character of the use (motion picture and television museum) is:

(a) public, and

(b) necessary

(2) Private operation and control of the museum and hopefully running for a profit does not constitute a private manner of use. And this is so without evidence testing the effective manner of use or planned use.

(3) Later return to private ownership is proper. And this is so without knowledge of the regulation and restrictions thereon.

(4) A property owner has no right:

(a) to be heard in Court, or

(b) to raise an issue as to public use.

(5) Courts cannot review a legislative enabling Act or administrative determination pursuant thereto

(a) extending the list and type of uses

(b) Establishing a fact finding as to public necessity for the particular location

(c) waiving restrictions and regulations to assure that public benefit will be the major purpose in theory, and result in practice. They will be conclusively presumed as a matter of law even in cases where ownership, operation and control have been or are intended to be delegated to private interests, even where there is no administrative agency to supervise such private operation.

(6) The question of fact:

(a) as to whether the manner of use is public or private may be taken from the jury notwithstanding plaintiff's constitutional right to jury trial and to due process.

(b) And further the Court may determine public use without evidence other than administrative determination that the type of use is

(1) public and

(2) the intended manner of operation is for the public benefit.

(c) Having taken the question of public use in this manner the Court may then deny opportunity to contest it. And all this procedure does not constitute a violation of due process. It is fair play, good administrative action, good government, a fair use of governmental power (legislative, administrative, and judicial) in an area where its actions impair Federal constitutional rights.

(7) California's fundamental policy on eminent domain shall be to enlarge governmental power at the expense of property rights and procedural rights. The above six points are but illustrative means whereby this end shall be accomplished. No safeguards of these rights need be honored. Spoliation, government taking to give to another private person, or to directly or indirectly create benefits to public officials is deemed as a matter of law no risk. And therefore, no defense or objection along these lines will be deemed relevant. California shall effect this policy of expansion of government power by encroachment on substantive and procedural rights. In the area of property rights it shall pre-empt them by eminent domain and by thwarting due process. Particularly California shall enlarge its power by,

(a) extending the type of uses where condemnation is permissible and

(b) by loose rules and procedures on the manner of operation and control, and

(c) thwarting procedural recourse by the particular victim and the general public.

This is the substance and effect of the California view declared by the decision and opinion in this case. It has been stated in such a manner as to reveal its flaws and dangers. Each of the above seven points of said opinion are stated as questions for review by this court.

Questions Presented.

(1) A question of law as to whether the character of the use came within the concept of public use in that no public interest, benefit or necessity therefor was shown. Consequently, the enabling statute the aforesaid sections 25353.3 and 25351.4 was an unconstitutional expansion of the power of eminent domain violating the due process clause of the United States Constitution. It was a taking of private property without due process of law. The Court's decision herein represents the California view defining public use in a broad and ever expanding way without justification in changing times and circumstances thus rendering the legislative determination open to judicial review. In view of the conflicting positions of the various States on the point which involves a United States constitutional right a ruling and clarification of the power of eminent domain is essential by this Court.

(2) A question of fact as to whether the manner of ownership operation and control of the condemned property is such as to substantiate the conclusion that the use was a public one.

(a) was the main purpose to serve public interest and necessity with private profit incidental thereto or vice versa?

(b) assuming the theoretical sufficiency of the character of the use, were the controls, restrictions and conditions of the taking such as to assure and, in fact, consummate the theoretical purpose?

(3) Question of procedure wherein it is contended due process was violated:

(a) was exclusion of evidence a denial of opportunity to be heard on a key element and thereby denial of a fair trial?

(b) should the Court have allowed evidence of private use, private profits and private controls?

(c) was the Court's ruling as a matter of law without any evidence in support and without allowing controverting evidence (rendering it a question for the Court) a denial of plaintiff's right to a jury trial upon this question. The Court excluded evidence of *intent* to operate privately under the guise of public use and also excluded evidence showing a lease turning over management operation, control and profits to private parties holding thereby as a matter of law that said evidence was irrelevant unless and until such wrongs were actually committed by the County. Accordingly it took no evidence on the issue of restrictions on the manner of operation in a case where the public is not to be owner or operator.

(4) Was it a violation both of the rights of free speech and freedom of expression as guaranteed by the United States Constitution to turn over to private interests policy making power over mass media affecting and forming public opinion. Similarly private management power over admission charges, hours, days, restaurants, service of alcohol, without restriction could cause operation as a private club violating personal constitutional rights. This could lead to racial and religious discrimination. Operation would be for profit rather than for public service.

(5) Was it not a condition precedent (an element of the *prima facie* case upon which the plaintiff had the burden of proof) for the plaintiff to show adequate restrictions in a case where the Government is on public record (which could have been determined by the trial Court by Judicial notice) as intending to or already has turned over operation of the main purposes to private interests, notwithstanding unconstitutional California holdings to the contrary.

(6) Whether the holdings of the lower Court as set forth in "Opinions Below" in this petition were correct.

Grounds for Stay.

A stay is sought pursuant to Title 28 of the United States Code, Section 2101 (Appendix D).

A stay of enforcement of the judgment herein is essential to the preservation of the *status quo* concerning the rights of the parties until the same can be finally determined by this Court. Unless a stay of enforcement of the judgment is granted, petitioner will be irreparably injured, in that petitioner will be ousted from his homestead and his home physically destroyed.

Constitutional and Statutory Provisions Involved.

The Constitutional and Statutory provisions which are relevant to the decision of this case and the pertinent text of which is set forth in Appendix C are Amendments I, V, and XIV of the United States Constitution; and Sections 25351.3 and 25351.4 of the California Government Code (Appendix A) and Title 28 of the United States Code Section 2101 (Appendix D).

Reasons for Granting the Writ.

The petitioner has no adequate remedy at law. Irreparable harm will be caused by enforcement of the judgment herein. The harm to be caused is grave. The problem is urgent. The action taken by Government herein is precedent setting and will invite further expansion of eminent domain and unlawful spoliation by public officials, and powerful private interests using this loophole. Mr. Anthony, his wife and their three children, are about to be forcibly ousted from their homestead. Their home will then be physically destroyed. Public indignation has lead to clear and present danger of violence and riots. The financial value of the property will be lost. The State Courts have refused relief. Petitioner has exhausted his remedies and is without other recourse. The County respondent herein has refused to relent. Substantial constitutional questions have been raised. For all these reasons this writ should be allowed. Petitioner respectfully asks oral argument.

Conclusion.

For the foregoing reasons it is respectfully submitted:

(1) that the petition for Writ of Certiorari be granted;

(2) that the enforcement and execution of the judgment sought to be reviewed be stayed pending final determination of this writ and the *status quo* maintained;

(3) that oral argument be granted;

(4) that the judgment appealed from be vacated and set aside and the action dismissed;

(5) that sections 25351.3 and 25351.4 of the California Government Code be declared unconstitutional;

(6) that the procedure followed by the legislative, administrative, and judicial bodies herein be declared unconstitutional on each of the several grounds set forth herein;

(7) in the alternative, that a new trial be granted,

(8) that such other and further relief as the Court may deem fit under the circumstances be granted.

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APPENDIX A.

California Government Code.

Section 25351.3 Right of board to construct, repair, etc. buildings and other facilities. In addition to its other powers and duties the board may:

(a) "Acquire land for and construct, lease, sublease, build, furnish, refurnish or repair" . . . . "motion picture and television museums, and related facilities as places of public assembly for the use, benefit and enjoyment of the public . . ."

(b) Acquire land and construct such buildings, structures and facilities thereon in whole or in part, with county funds or it may, by contract or lease with any *nonprofit* association or corporation, provide for the acquisition of land or the construction of such buildings, structures and facilities, or all or any part thereof, for such public purposes upon such terms as the board may determine.

(c) Lease, pursuant to Section 25371 of this code, any real property owned by the county and available for such public purposes to any person, firm, corporation or nonprofit association or corporation for such purposes, or any thereof, such person, person, firm, corporation or nonprofit association or corporation to lease the real property as improved back to the county for use for the purposes stated in the lease. Any lease authorized by the board under this subdivision (c) shall be awarded to the lowest responsible bidder after public competitive bidding conducted in the manner determined by the board. Notice inviting bids shall be published pursuant to Section 6066 of this code in such newspaper as the board may direct.

(d) Enter into a lease or sublease, without advertising for bids therefor, of such buildings, structures and facilities or any thereof with any nonprofit association or corporation which agrees to use the buildings, structures and facilities so leased to it for the public purposes for which the same were or are to be built; or contract without advertising for bids therefore, with any nonprofit association or corporation for the maintenance, operation and management or any thereof, of such buildings, structures and facilities or any part thereof, including the scheduling and promotion of events therein for a specified term, not to exceed forty (40) years, upon such terms and conditions as may be agreed upon. Such leases, subleases or contracts shall provide that at least annually there shall be paid to the county the net revenue, if any, from the operation and use of the facilities, remaining after the payment of expenses and costs, if any, for maintenance, operation or management, interest and principal payments upon loans to the nonprofit corporation or association for purposes of maintenance, operation or management, and any other expenses, and after providing maintenance and operation reserves. Such lease, sublease, or contract shall also provide that upon its expiration, all of assets of the nonprofit association or corporation after payment or discharge of its indebtedness and liabilities shall be transferred to the county.

25351.35 Same: Prerequisite approval of contract or lease involving obligation in excess of $1,000,000. In the case of any contract or lease described in subdivi-

sion (b) of Section 25351.3, obligating the county to make payments or incur obligations of one million dollars or more, the board shall not enter into such contract or lease unless and until the board has submitted such contract or lease to the qualified electors of the county at the next general election or at a special election to be called by the board for the purpose. Any special election held for this purpose shall conform as nearly as practicable with the general election law of the State. A summary of the provisions of such contract or lease shall be placed on the ballot and space provided for marking by voters to indicate their respective approval or disapproval of the contract or lease. Only if a majority of the electors voting at such election vote to approve the lease or contract as presented, shall the board enter into such lease or contract.

For the purposes of this section, all contracts or leases pertaining to one project shall be considered as one contract or lease.

This section shall not apply to any project for which the architectural contract has been executed prior to June 1, 1961. (Added by Stats. 1961 ch. 2206.)

25351.4 Same; "MOTION PICTURE AND TELEVISION MUSEUMS." As used in Section 25351.3, the term "motion picture and television museums" means a museum which includes, but is not limited to, any one or more of the following facilities:

(a) Completely equipped sound stages suitable for demonstrating to the public the actual filming of motion picture or television sequences;

(b) Theater facilities suitable for public showings of motion picture and television films of historical or educational interest;

(c) Film archives and related facilities for the physical preservation of motion picture and television films;

(d) Restaurant and refreshment facilities for the museum staff and the visiting public;

(e) Office facilities which may be rented as general offices to one or more nonprofit corporations which serve the interests of the motion picture or television industries as a whole (Added by Stats 1961 ch 98 2)

APPENDIX B.

Opinion of the District Court of Appeal.

[Civil No. 27508. Second Appellate District, Division Four. Filed January 14, 1964. J. T. Alley, Clerk.]

County of Los Angeles, Plaintiff and Respondent, vs. Steve E. Anthony, Defendant and Appellant.

Appeal from a judgment of the Superior Court, Los Angeles County, Aubrey N. Irwin, Judge. Affirmed. Petition for writ of supersedeas. Denied.

Interlocutory judgment of condemnation affirmed; petition for supersedeas to stay order of immediate possession denied.

Paul Hill for Defendant and Appellant.

Harold W. Kennedy, County Counsel, and Thomas W. Stoever, Deputy County Counsel, for Plaintiff and Respondent.

This is an appeal by Steve E. Anthony from a judgment in a condemnation action awarding him $11,750 for his one-half interest in property condemned for the erection of the Hollywood Motion Picture and Television Museum.

On January 9, 1962, the Board of Supervisors of Los Angeles County adopted a resolution determining that public necessity required the acquisition of defendant's property, among other parcels, as the site for the Hollywood Motion Picture and Television Museum. The county then invoked condemnation proceedings against appellant and others to condemn fee simple title in such property.

We are concerned on this appeal only with the proceedings relating to the acquisition of appellant's interest in one parcel.

The chief point raised by appellant is that he was improperly prevented from showing that his property was to be taken for other than a public use. In his answer to the complaint, he alleged:

> "That the purpose for which the said land is to be taken by eminent domain is not for a public use, but contrary is a private purpose to cause ownership of land to be taken from private ownership of land to be taken from private owners [sic] and turned over to other private persons for their profit, and that any public benefit to accrue from the said Museum is merely incidental thereto."

At the trial, appellant made the following offer of proof:[1]

> ". . . They [the Hollywood Museum Association] have entered into agreements with the County of Los Angeles whereby they are having a separate independent leasing corporation, leasing out prospective space in this so-called museum.
>
> "They are also engaging building contractors for the purpose of erecting this building upon this County ground, and it is my intent and purpose to prove that the Hollywood Museum is merely a front of some kind under the guise of eminent domain and under the guise of a public body to put

[1]Respondent points out that the offer of proof did not come until proceedings before the jury had begun and that, if admissible at all, such evidence was for the judge and not for the jury. However, the offer was not rejected on that ground and we consider the offer, as did the trial court, as an amplification and specification of the general language of the answer.

> up a private enterprise to be used for the next 30 years, and this separate income is to go into these various corporations that are going to build this building, run this museum, run the restaurant, and run other concessions within the building for a profit which the County does not participate in."

The trial court refused to permit testimony of the issue of public use, ruling that the existence of public use was shown as a matter of law. The trial to the jury was only on the issue of damages. Appellant, relying on *People v. Nahabedian* (1959), 171 Cal.App.2d 302, urges this action as error.

It is, of course, too well settled to require citation that property cannot be taken by condemnation unless such taking is for a public use. Consequently, we are faced with two questions: (1) is a motion picture and television museum a "public use"; and (2) did appellant's pleading and offer of proof adequately raise an issue as to the existence of such a use in this case.

Section 25351.3 of the Government Code, as it read at the time this condemnation proceeding was instituted, in part provided:

> "In addition to its other powers and duties the board may:
>
> "(a) Acquire land for and construct, lease, sublease, build, furnish, refurnish or repair buildings for . . . motion picture and television museums and related facilities as places of public assembly for the use, benefit and enjoyment of the public. . . ."

As a general rule, the legislative department is the source of power to determine what shall be held to be a

public use; except in extreme cases, its action on the question is not open to review by the courts. (*Santa Ana v. Harlin* (1893) 99 Cal. 538, 542; *Con. Channel Co. v. C. P. R.R. Co.* (1876) 51 Cal. 269; 28 S. C. L. R. 369, 380-381.) In this case the legislative determination that a motion picture and television museum is for public uses and purposes, not being unreasonable, is binding and conclusive on this court.

However, while a legislative determination as to what is a public use, if not unreasonable, is binding upon the courts, such a determination does not preclude a person whose land is being condemned from showing at trial, that as a matter of fact, the actual use of the land will be subserved for private rather than public purposes. (*County of San Mateo v. Coburn* (1900) 130 Cal. 631; *Stratford Irr. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61.)

The issue before us is whether the leasing of this property to private individuals to run the museum, hopefully at a profit, constitutes a taking for private rather than public use?

This contention has been answered by *Redevelopment Agency v. Hayes* (1954) 122 Cal.App.2d 777, where the court stated (at pp. 803-804):

> ". . . there have been two different interpretations of 'public use' in this county, one the broader meaning of 'public utility or advantage,' the other narrower one of 'use, or right of use, by the public.' . . . In California our courts have followed the broader definition of 'public use' and the cases hereinbefore cited have held that if property is taken for a public use, the fact that it is later to be returned to private ownership subject to restrictions

protecting the public use, does not make it any the less a public use. . . . Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefits is not sufficient to take away from the enterprise the characteristics of a public purpose."

It will be noticed that appellant's offer of proof does not contravene the fact that the museum here involved is one that will serve a public purpose, but claims only that certain persons will make a profit from its operation. Under the California view of "public use" this offer of proof was properly excluded.

Appellant's reliance on *People v. Nahabedian*, *supra* (1959) 171 Cal.App.2d 302, is misplaced. In *Nahabedian*, the State of California, through its Department of Public Works, instituted condemnation proceedings to acquire certain property for state highway purposes. At trial, defendant sought to prove that the real purpose of the state's condemning his property was to lease it to Walt's Auto Park for private purposes without any relation to the highway project. Here, appellant does not contravert the fact that his property will be used for the Motion Picture and Television Museum; only that such museum will be run by private individuals who will derive a profit from its operation. As stated previously, this factor alone does not discount or negate the fact that the taking of appellant's property is for the uses stated in the complaint for condemnation, which use the Legislature has declared to be a public one. As the trial court stated, if the alleged contract by the county for construction, operation and maintenance of the museum violates any

provisions of law or of the Constitution, appellant's remedy is in an action attacking that contract and not in an attempt to defeat a proper acquisition of land for a valid public purpose.

Appellant also contends that "the trial Court abused its discretion by ruling out evidence pertaining to the classification and the type of the real property of said defendant and appellant, or the true value thereof, based upon its best use, whereby the Jury was guided or misled as to the relative or actual and/or comparable value of defendant's premises in comparison to the value of the land immediately adjacent and in close proximity thereto." We are not required to consider a point made in such general terms, without reference to the record, citation of authority or elaboration. (3 Witkin, California Procedure, Appeal, §150.)

Subsequent to the entry of the interlocutory judgment of condemnation, the county secured an order for immediate possession, purportedly pursuant to section 1254 of the Code of Civil Procedure. Appellant thereafter filed in this court his petition for a writ of supersedeas to stay the effect of that order pending this appeal. We granted a temporary stay pending our further consideration of the entire matter. In *Housing Authority v. Superior Court* (1941) 18 Cal. 2d 336, the Supreme Court held that the grant or denial of an order for immediate possession lay within the discretion of the trial court, saying (at p. 340):

> ". . . the court to which the application for possession is addressed must be deemed to be in the best position to judge in the first instance whether the defendants would be adequately protected by the deposit in court, if the question of

> the plaintiff's right to take the property should be decided favorably to the defendants on the appeal. The trial court should also be considered the best judge of whether the project will be retarded by the fact that the [condemnor] does not have possession of the property pending the appeal."

On authority of the case just cited, and in light of our decision of the appeal on its merits, the temporary stay heretofore granted is vacated forthwith. The judgment appealed from is affirmed; the petition for a writ of supersedeas is denied.

Kingsley, *J.*

We concur:

Burke, *P. J.*

Jefferson, *J.*

APPENDIX C.

The Constitution of the United States.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV

Section 1. ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D.

United States Code Annotated.

Title 28, Section 2101

". . . (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

"(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer all damages and costs which the other party may sustain by reason of the stay . . ."

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PETITIONER'S BRIEF.

POINT ONE.

The Type of Use, a Television and Motion Picture Museum, Is Not of Such Character as to Meet the Test of Public Necessity.

There is no precedent for such use being held sufficient for exercise of the power of eminent domain. This use is more analogous to public monuments. It should and could be established by government voluntarily, without the use of eminent domain. The use does not require a particular location. Further, there is no "necessity" in this type of use. There is no change in conditions such as to warrant an expansion of the list of permissible uses. The particular type of museum sought to be established is not "public" in nature. It is more in the nature of a trade museum. On balance it may be said to be more for the benefit of a particular trade and a particular private industry than the public in general.

Kohl v. United States (Ohio, 1876), 91 U. S 372.

POINT TWO.

Where a Public Use Is to Be Effected by Private Ownership, Operation and Control Special Rules Must Be Applied to Assure That the Public Interest Will in Fact Be Served. Otherwise an Unconstitutional Delegation of Government Power Results.

First the regulations and restrictions on the private operators must be such as to assure this result. The operator must be in the nature of a public service corporation regulated by a public agency in the nature of a public service commission. Secondly, where benefits flow to private parties the manner of operation and control must be presently tested to assure: (a) the main benefits will be reserved to, or revert to the public, and (b) no more than limited benefits shall flow to the private operators.

POINT THREE.

Petitioner's Procedural Rights as Secured by Due Process Were Violated.

At the legislative level a public referendum would be a requisite in order to extend the list of uses granting the legislature further power under eminent domain. Unless it is a clear case of public necessity a legislative extension of power by the use of semantics is unlawful.

Enlarging legal definitions is a means of evading procedural requirements.

At the administrative level good administrative procedure required evidence and a hearing and right of ob-

jection as to whether the particular location was necessary and as to whether the plan and manner of operation sufficiently insured a public use in fact. This assumes (which we do not concede) a valid public use for the administrative agent to carry out.

At the judicial level Due Process required the following:

(a) the Government as an element of their *prima facia* case must allege a public use and either public operation or a sufficient plan of private operation to protect the public interest.

(b) These elements must first meet the aforesaid legislative and administrative requirements. They are then open to contest if issue is raised by the pleadings and proof. Thereupon the burden of proof is on the Government. Here therefore, the burden was on the Government to show a valid public use, the need for the particular location and a plan of operation sufficient to protect the public interest. The trial Court should have considered all of the circumstances and thereupon balance and test the public versus the private benefits. Only upon a showing that the major benefits went to the public could it be said to be a valid public use in fact. The Court should have taken evidence on the nature of the use to determine whether it was public and necessary. The Court should have reviewed the legislative determination of public necessity. The Court should have reviewed the administrative actions to determine whether or not they were arbitrary, capricious, and supported by legal authority. All of these were questions of law and

fact for the Court. They were improperly relied upon by the trial and appellate Courts. Whether or not the manner of use either was or was not intended to be for private benefit was a question of fact for the jury. Although petitioner made this charge by way of affirmative defense it was part of the Government's case. The burden of proof therefor, to show not spoliation, remained nevertheless on the Government. The Government failed to sustain its burden of proof on this point. The trial and appeal Courts improperly ruled that no proof thereon was necessary as a matter of law. The Court improperly took the question from the jury.

United States v. 23.91229 Acres of Land, 192 F. Supp. 101 (March 1961);

Merced Dredging Co. v. Merced County (D. C. Cal. 1946), 67 F. Supp. 598;

Missouri Pacific R.R. v. Nebraska (Neb. 1896), 164 U. S. 417; 17 S. Ct. 130; 41 L. Ed. 489;

Cole v. LaGrange, 113 U. S. 1.

POINT FOUR.

The Constitutional Right of Free Speech Was Impaired by This Abuse of the Power of Eminent Domain.

Private management has the power to dictate standards of thought and expression through control of the mass media of television and motion pictures. This area of activity should be left free of Government control. In no event, should it be delegated to private interests.

POINT FIVE.

State Views Have Developed Which Are Inconsistent With Each Other Upon This Federal Right Causing Unequal Protection Under the Law in Reference to the Interpretation of Public Use in the Various States.

The tests applied by the various States as to what facts and circumstances render the use in fact a private one, although designated as public are varied and unequal.

POINT SIX.

The New Trend of Accomplishing Public Purposes Through Private Ownership, Operation or Control Is Dangerous and Therefore Should Be Carefully Restricted. Governmental Power Is Non-Delegable.

This trend when coupled with an expansion of the power of eminent domain leads to further governmental control of the political, economic and cultural phases of our way of life. These functions are moved from the private to the public sectors with the attendant evil of benefit to special interests and self-perpetuation by civil servants.

The legislature may choose the best means of accomplishing a public purpose. But the presumption should be against private operation. There should be a clear showing why this exceptional method should be used. In the cases of public utilities and urban redevelopment it can be shown that the Government needs private businessmen to accomplish these purposes. It can be shown that a limited profit incentive must be offered them to draw them from other competitive lures.

Further they must be protected against the risk of loss by governmental guaranty of small, but certain profits. The instant case does not meet this test. Can it be said that a private film mogul or a Madison Avenue type promoter can stand up against a public curator. Predatory birds are hardly fit keepers of public taste, morality and art forms, nor should they be given public power to control or influence public thought and expression. Under the holding of this case they can set standards according to their own commercial needs and justify them as "public museum". There is no public service commission to oversee them.

Rabinoff v. District Court, 358 P. 2d 879 (Jan. 1961), Adhered to on Rehearing 360 P. 2d 114.

In the case cited the dissent criticized strongly ". . . the direction of unrestrained exercise of totalitarian and potentially tyrannical power by those in positions of governmental authority . . ."

The dissent relied strongly on the constitutional requirements that property must be condemned for a public use and that individual constitutional rights must be maintained in the face of the threat of the "new dictator agency".

The better view is to restrict the concept of public use to established cases of public necessity. Before further encroachment on private property rights a clear showing of public necessity should be established by public referendum leading to legislative enactment. Private operation of public functions should be frowned upon unless it can clearly be shown that this function can not be performed directly by Government or that it can be better performed by private operation. Private

operation should require supervision by a public service commission, and performance by a limited profit public service corporation. Even so called "incidental functions" such as restaurants, parking, and other functions which may be concessioned out to private parties should be clearly incidental to the main purpose and subject to public supervision and control. Unless particular property can be shown to be essential to the carrying out even of a legitimate public function eminent domain should not be used. To establish necessity it should be shown that the particular property is essential because of its location, and because no substitute property is available to the Government by means of purchase on the open market. Additionally before divesting the property owner of his rights the harm to him should also be considered as a circumstance. The public benefit should clearly outweigh in the balance the harm caused to the private citizen. Here, a man is being deprived of his homestead. The property is located in a teeming commercial area with great promise of increasing value. The Government has available to it alternate and better locations by direct purchase. The function for which the property is sought does not involve the general public, nor is it essential. As Judge Franzt said in the above dissent "How can those of humble means acquire and hold property. Where will the evicted persons go?"

Forced migration is normally offensive especially when forced on people presently inoffensive. And so it was with Mr. Anthony who found himself confronted with bulldozers, shot guns and tear gas as he attempted to lawfully defend his property against a governmental abuse.

Under the California view the people are being sold out in the area of conflict between governmental power over the people, and the limitations thereof fixed by the Constitution. The power of the people exercised by public referendum, ballot box, jury action and right to judicial recourse have been impaired. This is a Government of the people, by the Government for the Government. Public officials are invited to be arbitrary, capricious high-handed, self-perpetuating, and to serve special private interests. We suggest nothing radical or retrogressive as an end. We advocate the Constitution. We have faith and believe that this is the only way to change. We advocate maintenance of a rule of law, uniform, just and independent of the man and the moment. The real issue, here, already stated, is whether we are to have ever-more powerful public servants, and whether they are to be relieved of constitutional fetters. California has declared itself on the rate of this trend—expedition thereof to the maximum. Government on the one hand, the people and the Constitution on the other—in battle relation. An attitude of defiance towards the people, resentment of restriction on power, of superiority over the people, treating them as wards—all these are the very conditions that the spirit of our Constitution abhors. We must recognize that even a democratic form of Government with a constitution is vulnerable to abuse and control by the few. Erosive legal semantics to expand power and evade limitations are unconstitutional amendment processes.

Three recent New York cases have restricted definitional expansion. It was held that land could not be condemned for a park or beach in the absence of permissive referenda required by law.

Town of Huntington v. Lustig, 226 N. Y. Supp. 2d 169 (March 1962);

Town Board of Town of Islip v. Fishman, 230 N. Y. Supp. 2d 293 (July 1962).

It would seem that a museum is an even lesser public use, not warranting the exercise of the harsh power of condemnation.

The people await hopefully. They put their faith in this Court to restore government to its proper position. Not for demagoguic popularity, but to gain the respect of the people which it is duty bound to earn. The respect and confidence of the people is essential to a sound democratic process. This philosophy of Government expressing the relationship between man and Government is the spirit behind the Due Process clause.

In the third New York case it was held that condemnation of a public utility (public necessity was not an issue) required nevertheless, prior approval of the relevant administrative agency.

Great Neck Water Authority v. Citizens Water Supply Co., 187 N. E. 2d 780.

This case shows how far some Governments and their Courts will go in establishing procedural safeguards over eminent domain. This is a good rule. It is not unduly limiting to Government nor inflexible. It

reflects quite a difference in attitude. It condemns loose procedures, bold takings, and wild West justice. Wrongful exercise of eminent domain is governmental trespass. The damages are far reaching. All property owners and the general public are involved. It is a misuse of the greatest and most dangerous power—public power. Personal rights under our way of Government and life grow out of and depend upon property rights. Ethereal personal rights often depend upon spatial realization. Perhaps then they should receive the same attention from this Court as it has lately given to the perfecting of personal rights. The same set of conditions which support the present trend of Government destroyed freedom in the 17th and 18th centuries and lead to the birth of the United States and the need for a Constitution and a Bill of Rights. They are delicate things, easily destroyed. It was the peculiarly American contribution to human sociological history to resist and check Governmental power and to place the last word with the people. The last line of the Constitutional defenders is this Court. As it speaks for the rights and the power of the people this august Court will thereby restore and improve the constitutional concept of government.

American, your way of life rests on the security of the home. And in the last analysis the deed to your home—is the Constitution.

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